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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~748~~ 45

FEDERAL POWER COMMISSION,
Petitioner,

vs.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
THE CITY OF NEW YORK,
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICI CURIAE
on Behalf of the People of the State of California and the Public Utilities Commission of the State of California

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February 29, 1960

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TABLE OF CONTENTS

	Page
The Interest of the State of California	2
Proposed Projects to California	3
Transwestern Pipeline Company	3
The Rock Springs Project	3
The Pacific Gas Transmission Company	3
The Harmful Impact of the Instant Decision	4
Question Presented	5
Statement	5
Reasons for Granting the Writ	8
Argument	9
A. The Case Is of Nationwide Importance and Requires Prompt Consideration by This Court	9
B. Prompt Review of This Case Is Necessary Because the Gap in Regulation Created by the Decision Below Has an Immediate Crippling Effect on the Commission's Regulation of the Gas Industry	10
C. Review Is Necessary Because of the Impact of This Case on the Industry's Market Structure Which Has Been Shaped by a Pattern of Twenty Years of Commission Regulation	12
Conclusion	16

TABLE OF AUTHORITIES

Cases	Pages
Atlantic Refining Company, et al. v. Public Service Commission of New York, 360 U.S. 378 (1959)	5, 9
Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 591 (1944)	44
Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana, 332 U.S. 507 (1947)	13
Phillips Petroleum Company, et al. v. State of Wisconsin, et al., 347 U.S. 672 (1954)	5, 9
Statutes	
California Public Utilities Code, Sec. 307	2
Natural Gas Act (Act of June 21, 1938, c. 556; 52 Stat. 821-833, 15 U.S.C. 717-717w)	9
Federal Power Commission Proceedings	
El Paso Natural Gas Company, Docket No. G-13862	12
El Paso Natural Gas Company, Pacific Northwest Pipeline Corporation, Colorado Interstate Gas Company, Docket Nos. G-16235, et al.	3
Pacific Gas Transmission Company, Pacific Northwest Pipeline Corporation, The Montana Power Company, Docket Nos. G-17350, et al.	3
Transwestern Pipeline Company, et al., Docket No. G-14871	3, 12
Texts	
Bureau of Mines, Mineral Yearbook, Natural Gas, 1950, 1958	11
Bureau of Mines Yearbook, 1958, Natural Gas, Table 9	2
FPC Report, Direct Sales by Producers of Natural Gas to Reporting Interstate Natural Gas Pipeline Companies—1957-1958, Table 7	11

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The People of the State of California and the Public Utilities Commission of the State of California (hereinafter called California), through its Attorney and Chief Counsel, ask that the Federal Power Commission's petition for

certiorari here be granted so that the decision of the Court of Appeals below be reversed and vacated.[1]

THE INTEREST OF THE STATE OF CALIFORNIA

California is concerned with this cause. California gas distributing utilities serve a population in excess of 15 million people throughout the state. Approximately three-quarters of the natural gas utilized in California comes from out-of-state sources. Presently the sole out-of-state supplier of natural gas to California is the El Paso Natural Gas Company, which is subject to the jurisdiction of the Federal Power Commission. California gas utilities presently purchase over 2,000,000,000 cubic feet of natural gas daily for the California market—requiring an outlay of over $600,000 a day for such gas, or over $200,000,000 a year (and sustaining an investment by El Paso of over $1,500,000,000). Such imports of interstate natural gas constitute over 10% of all the natural gas moving in interstate commerce throughout the United States—and exceeds the volume of gas imported by any other state.[2] The interest of California in an adequate supply of natural gas at a just and reasonable price has been the subject of administrative litigation by this Commission over many years before the Federal Power Commission. California's problems are real, not academic.

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1. The undersigned Attorney and Chief Counsel for the Public Utilities Commission of the State of California is charged with the duty and responsibility of representing and appearing for the People of the State of California and the Public Utilities Commission of said State in all matters concerned with public utility regulation (Section 307, California Public Utilities Code, formerly Section 4 of the Public Utilities Act). The Public Utilities Commission exercises exclusive jurisdiction over all public utility regulatory matters, including the regulation of rates and service of gas utilities furnishing either natural or manufactured gas to consumers of California.

2. Bureau of Mines Yearbook, 1958, Natural Gas, Table 9.

PROPOSED PROJECTS TO CALIFORNIA

In addition to California's existing sources of out-of-state gas, California's population and industrial growth require annual additions of natural gas from new out-of-state sources. Presently, three pipeline projects are in various stages before the Federal Power Commission.

Transwestern Pipeline Company.[3]

The Federal Power Commission has authorized Transwestern Pipeline Company of Houston, Texas, to construct a new $191,700,000 system in the southwestern United States to supply 300,000,000 cubic feet of natural gas daily to markets in Southern California.

The Rock Springs Project.[4]

The El Paso Natural Gas Company proposes to build and has made application to construct a pipeline from the State of Utah to the Southern California border, at a cost of $77,896,000, to deliver 470,000,000 cubic feet of natural gas daily to the California market.

The Pacific Gas Transmission Company.[5]

The Pacific Gas Transmission Company has made application to the Federal Power Commission to construct a pipeline from the Province of Alberta in Canada across the international border, through the States of Idaho, Wash-

3. *In the Matter of Transwestern Pipeline Company, et al.*, Docket No. G-14871—Federal Power Commission.

4. *In the Matters of El Paso Natural Gas Company, Pacific Northwest Pipeline Corporation, Colorado Interstate Gas Company*, Docket Nos. G-16235, et al.—Federal Power Commission.

5. *In the Matters of Pacific Gas Transmission Company, Pacific Northwest Pipeline Corporation, The Montana Power Company*, Docket Nos. G-17350, et al.—Federal Power Commission.

ington, and Oregon, to the northern border of California. This proposed pipeline is designed initially to transport 414,000,000 cubic feet per day at a cost of $337,765,000.

The total investment in these projects is $607,361,000. The total gas supply delivered is 1,184,000,000 cubic feet per day. Even an increase of one cent per Mcf in the cost of imported gas would increase the annual natural gas bill of California consumers by nearly $7,000,000.

The interest of California in this proceeding is vital. This brief is therefore filed on behalf of California consumers to urge that the Supreme Court act in support of the Federal Power Commission in its effort to protect the interests of the millions of ultimate consumers as the Natural Gas Act contemplates.

THE HARMFUL IMPACT OF THE INSTANT DECISION

California urges that the petition for certiorari here requested be granted. The instant decision, if allowed to stand, will have a harmful effect upon effective control by the Federal Power Commission of rates. Secondly, and of equal importance, the instant decision deprives the federal agency of all discretion to withhold a certificate in those cases where, despite demonstrated harmful economic and social consequences, this agency, by law, must grant a certificate when certain minimal standards are met.

California, because of its dependence upon natural gas and its interest in a continuing supply thereof, at just and reasonable prices, is of the opinion that this decision upsets the delicate balance which has been established in this regulatory field between the firm user of gas and the interruptible user of gas. By removing a measurable segment of gas from the jurisdiction of the Federal Power Commission, the decision of the Court of Appeals creates a

gap in regulation, throws into competition with a controlled part of the industry an entire body thereof, which will have serious financial impact upon existing gas distribution companies. It is apparent that gas sold by producers in one state without control, for distribution in another state without control, makes out a transaction free from any effective regulation, and particularly as to price.

The instant decision, if allowed to stand, will in a large area of this particular industry remove the protective decision of this Court in *Phillips Petroleum Company, et al. v. State of Wisconsin, et al.*, 347 U.S. 672 (1954). Additionally, the initial price protections which this Court re-affirmed in *Atlantic Refining Company, et al. v. Public Service Commission of New York*, 360 U.S. 378 (1959), will also be removed.

It is plain to California that none of these results is in the public interest; they are certainly contrary to the spirit and letter of the Natural Gas Act.

California asks that the relief herein sought be granted and that the decision of the lower court be reversed.

QUESTION PRESENTED

Whether, under the Natural Gas Act and within the concept of public convenience and necessity, the Federal Power Commission has authority to deny a certificate if, in its expert judgment, it determines that the granting of such certificate and the actions authorized thereunder will be contrary to consumers' interest and to the public interest.

STATEMENT

The case arose in this manner. For a number of years Transcontinental Gas Pipe Line Corporation ("Transco") (running from the Texas Gulf Coast area to New York) has

been effectively precluded by virtue of its favored nation clauses from purchasing new supplies of gas in Texas Railroad Commission Districts II and IV (Southwest Texas Gulf Coast).[6]

Accordingly, it was determined that, in lieu of Transco purchasing gas in the field, Transco's principal customer in the New York area, Consolidated Edison Company of New York, Inc. ("ConEd"), should do so. Additionally, it was decided that if ConEd were to purchase the gas in its capacity as a steam electric generating company (instead of in its capacity as a natural gas distribution company) the purchase and sale would be one for "direct" industrial use and not for resale. Since the Natural Gas Act covers rate jurisdiction only over sales for resale (and not for direct industrial consumption) the purchase and sale would be wholly non-jurisdictional insofar as federal price regulation under the Natural Gas Act was concerned. No certificates would be required by the independent producers making the sale — so the initial prices sought to be charged would not be subject to review. Since the sales would not be for resale, there would also be no continuing price jurisdiction over the twenty year contract term. On this non-jurisdictional basis, ConEd contracted to purchase gas in the Normanna and Sejita fields in the Texas Gulf Coast area (Districts II and IV) at a flat price of 19¼¢ per Mcf, principally for proposed use under two of the boilers of its Waterside steam electric generating station in New York.

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6. The current contract price of Transco's existing supplies of Texas Gulf Coast gas in Districts II and IV is 8¢-10.7¢ per Mcf, while new supplies of nearby gas (District I) cost from 14¢ (initially)—18¢ (finally) per Mcf with escalation and so-called "better market" provisions. New Transco contract purchases made in Districts II and IV would accordingly "trigger" large price increases in its existing supplies. (Transco Prospectus dated July 28, 1959, p. 10).

According to the plan, the gas purchased by ConEd in the field in Texas (under contracts specifying only deliveries for direct consumption on ConEd's steam electric generating plants in New York), would then be delivered by the field producers to Transco's natural gas transmission system. This gas—indistinguishably commingled with Transco's other gas—would then be transported to New York by Transco and "separately" redelivered to ConEd's general natural gas distribution system in the New York City area, but "earmarked" for sole use under the boilers of the Waterside steam electric generating station near the United Nations' buildings where smoke conditions were particularly acute.

Such "earmarked" deliveries (of 50,000 Mcf per day) would be equal to about ⅓ of the 144,000 Mcf per day maximum daily contract quantity of other jurisdictional gas delivered by Transco to ConEd for general gas distribution and resale purposes pursuant to ConEd's jurisdiction.[7] Except for contract and accounting purposes, there would be no physical or other segregation of gas anywhere along Transco's pipeline, or in ConEd's natural gas distribution system.[8]

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7. Transco Prospectus, *ibid*, p. 8.

8. Transco's proposed transportation charge for the non-jurisdictional gas would be 23.38¢ per Mcf (100% load factor) making the total cost of the non-jurisdictional gas delivered to ConEd 42.63¢. This compares to between 34.23¢ and 38.23¢ (100% load factor) for deliveries of jurisdictional gas by Transco at the New York City gate, the higher price being collected subject to refund (Docket No. G-18783). The difference approximately represents the higher field price of gas which ConEd would pay in the field compared to the average cost of Transco's over-all field gas supplies (Presiding Examiner's decision, pp. 23-24 (R. 10023); also, Transco Reply Brief, dated June 2, 1958, before the Presiding Examiner, p. 16). Based on 50,000 Mcf per day for 10 months, the total additional cost to ConEd—and ConEd's electric consumers (pursuant to ConEd's fuel adjustment clauses)—would be between $650,000 and $1,250,000 a year.

Recognizing the implications of the transaction in (1) evading the general regulatory scheme provided by the Natural Gas Act, (2) pre-empting pipeline and distribution capacity for specific direct industrial uses, (3) opening an avenue of increasing bidding for natural gas supplies in the field, and (4) recognizing the marginal utility of gas destined solely and exclusively for steam electric boiler fuel use, the Federal Power Commission exercised its authority over the transportation (as distinguished from authority over sale for resale) in interstate commerce service for ConEd—pointing out that, although conventional factors of adequacy of pipeline design, reasonableness of cost, ability to finance, and economic feasibility were present as a basis for authorizing the necessary pipeline construction and operation requirements, the factors enumerated above were "policy considerations" which required denial of certificate authority to Transco to perform the regulated transportation service (21 F.P.C. 138 (January 31, 1959); R. 174-183). Rehearing was denied (21 F.P.C. 399 (March 26, 1959); R. 184-194).

As a result of this decision, both ConEd (as intervenor) and Transco (as applicant) appealed to the Court of Appeals for the Third Circuit. On November 3, 1959, the Court reversed the Commission.

REASONS FOR GRANTING THE WRIT

The instant decision compels the Federal Power Commission to issue a certificate authorizing the transportation of natural gas in interstate commerce to an ultimate market even though such gas is purchased on a non-jurisdictional or unregulated basis, whenever minimal statutory requirements have been met. These minimum requirements, as the Court construed them, ignore entirely any considerations

of economic impact and its effect upon the public interest. The instant decision permits, and indeed invites, direct sales such as here, all of which avoid the complete regulatory scheme set forth in the Natural Gas Act. Most importantly, it exempts the producers of gas from any regulation. With price such an important factor in determining public convenience and necessity, it is evident that to create such a huge exemption as this does not suit the public interest.

ARGUMENT

A. The Case is of Nationwide Importance and Requires Prompt Consideration by this Court.

This case involves a new attempt to avoid Federal Power Commission regulation which should be promptly and emphatically disapproved. While this is the first decision upon the question presented, it will have far-reaching effect and deserves the immediate attention of this Court in order to prevent a serious setback to the effective regulation of the natural gas industry. The transaction involved was apparently tailored to avoid Federal Power Commission price regulation under the Natural Gas Act (Act of June 21, 1938, c. 556; 52 Stat. 821-833, 15 U.S.C. 717-717w). Its approval by the Court below, reversing the Commission's efforts to carry out its regulatory duties, would create a gap in federal regulation of the gas industry which would effectively emasculate this Court's decisions in *Phillips Petroleum Co. v State of Wisconsin*, 347 U.S. 672 (1954), and *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378 (1959). A denial of certiorari at this time will encourage the adoption of trade practices similar to the complex devices employed in this case to avoid Federal Power Commission regulation and thus tend to overcome the efforts of this Court and the Federal Power Commission to protect the interests of consumers.

B. Prompt Review of this Case is Necessary Because the Gap in Regulation Created by the Decision Below Has an Immediate Crippling Effect on the Commission's Regulation of the Gas Industry.

The decision of the Court of Appeals requires the Federal Power Commission to issue a certificate covering interstate transportation of gas whenever such gas is purchased in the field for direct consumption without considering the effects of such arrangements on the regulated natural gas industry. It permits large direct industrial customers to bid for and secure independent supplies of gas in the field free from regulation and in competition with existing pipe line companies, irrespective of the effect on the consumer.

Review of the decision in this case is especially urgent because of the difficult regulatory problems which currently face the Federal Power Commission. As this Court is all too well aware, development of an effective regulatory program for independent gas producers, in the face of an unprecedented demand for natural gas, has created difficult problems for the Commission. The decision below greatly amplifies these problems at a critical stage of producer regulation, and, unless promptly corrected, will result inevitably in higher gas prices to all consumers. This problem is both urgent and national in scope.

At the present time, California purchases more than $200,000,000 of gas a year. This gas, all resold in California, is delivered at the California-Arizona border by El Paso Natural Gas Company (a major natural gas transmission pipe line company) at rates subject to the Federal Power Commission's regulatory jurisdiction. Within the past 10 years—since the initiation of service in 1947—the price of this gas, delivered, has doubled, increasing from about 15¢ in 1949 to over 30¢ per Mcf, an unparalleled

rise in the postwar cost of any regulated commodity entering so importantly into the cost of living.[9]

For the most part, the rise in the price of interstate gas purchased by the California utilities has resulted from the bidding up of gas prices in the Permian Basin and Panhandle Field areas in southwestern Oklahoma, Texas, and New Mexico, where the major portion of El Paso's supplies for the Southern California area are produced.[10]

As a consequence, the California utilities are today paying $75,000,000 more a year for gas than the same volumes of gas cost them *as recently as 1957*. Nationally, the increases amount to several hundred million dollars a year. If the decision below is not reversed, and the Commission's authority to deal with evasions of the type presented here confirmed, the natural gas industry faces continued pricing

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9. This rise in the city gas price is directly reflected in the cost of gas at the point of consumption. In this same period of time, 1948-1958, the average value of natural gas at points of consumption throughout the United States has risen from 24.1¢ per Mcf to 46.2¢ per Mcf, an increase of over 90% (Bureau of Mines, Minerals Yearbook, Natural Gas, 1950, 1958). By contrast, the Consumer Price Index, widely used as a cost-of-living index, stands at 125.6% (November, 1959), an increase of only 25% over the same 1947-1949 base period.

10. Even three years ago, in early 1957, this gas sold at prices of 9¢-10¢ per Mcf. Today, typical prices are twice this level—18¢-20¢ per Mcf. The average price of El Paso's field purchases was 9.5¢-10.2¢ per Mcf in 1957-1958 (FPC Report, Direct Sales by Producers of Natural Gas to Reporting Interstate Natural Gas Pipeline Companies—1957-1958, Table 7). By contrast, Transwestern Pipeline Company, newly certified by the Federal Power Commission in August, 1959, contracted for new supplies at 18¢-23¢ per Mcf in the same areas (Opinion No. 328, issued August 10, 1959.)

Nationally, the picture is the same. In 1948, the average value of gas at the wellhead was 6.5¢ per Mcf. Today (1958), it is 11.9¢ per Mcf, an increase of about 85% (Bureau of Mines, Minerals Yearbook, Natural Gas, 1950, 1958). This increase is even sharper in some major areas, such as Texas, where the field price of gas has more than doubled in this 10-year period (Bureau of Mines, *ibid.*).

problems of a major character. Millions of ultimate gas consumers are similarly affected.

As the Commission pointed out, multiple bidding activity by large industrial users of gas would "unnecessarily increase the price of natural gas" (R. 175). Since such sales would be for direct use and not for resale, they would be exempt from the Commission's rate jurisdiction under the Natural Gas Act. Many producers would hold their gas for direct sale only to such large industrial customers, and the inevitable result would be to drive natural gas field prices—applicable to all gas sales—to even higher levels than exist today.[11]

C. Review Is Necessary Because of the Impact of This Case on the Industry's Market Structure Which Has Been Shaped by a Pattern of Twenty Years of Commission Regulation.

A basic and long-enduring problem of the natural gas industry is the large demand for gas for space heating in winter months which is not balanced by comparable demands during the balance of the year. If adequate pipeline capacity were built solely to satisfy peak winter demands,

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11. The effect of even potential purchases of this type has already been noted by Commission Examiners in recent decisions. Thus, in *Re El Paso Natural Gas Company*, Docket No. G-13862, et al., decision issued February 26, 1959, p. 25: "• • • the producers had the option of dealing with either El Paso or Transwestern • • • and they further had under consideration use of the gas in their own refining plants in California and the possibility of selling the gas to Southern California Edison Company, or selling the gas through a pipe line which they could construct themselves."

Also, in *Re Transwestern Pipeline Company*, Docket No. G-14871, et al., decision issued July 1, 1959, p. 8: "[Southern California Edison Company] competed against the Pacific Lighting Gas Supply Company for the purchase of the Transwestern gas which is the subject of this hearing • • •. The record also shows that Edison has been actively negotiating for the purchase of substantial quantities of natural gas, both off-shore and on-shore, in Louisiana, to be transported to Edison's steam generating plants, in California to replace fuel oil and interruptible gas service."

it would be idle during much of the year, substantially increasing the cost of transporting and distributing gas. Pipe lines and distributors meet this problem to some extent by gas storage, but primarily by interruptible sales of large volumes of gas to industrial customers during off-peak periods. These sales benefit domestic consumers by spreading capital costs and reducing incremental costs of gas delivered by the system. However, if the decision below stands, straight gas distributors are seriously threatened with the loss of such load-balancing interruptible industrial sales. The result will be imposition of unrecovered fixed costs on the millions of ultimate consumers using gas for residential and commercial purposes.

In *Panhandle Eastern Pipe Line Company v. Public Service Commission of Indiana*, 332 U.S. 507 (1947), this Court held that direct sales are subject to State rate jurisdiction. In commenting on Panhandle's attempts to avoid this jurisdiction the Court said:

> "• • • 'the primary aim of this legislation [the Natural Gas Act] was to protect consumers against exploitation at the hands of natural gas companies.' The scheme was one of cooperative action between federal and state agencies. It could accomplish neither that protective aim nor the comprehensive and effective dual regulation Congress had in mind, *if those companies could divert at will all or the cream of their business to unregulated industrial uses.*[19] (pp. 520-521; emphasis supplied.)
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> • • •
>
> "[19]Over 38 percent of the gross revenues of the local Indiana utilities from the sale of gas is derived from service to the approximately 250 industrial consumers served by them. If service to any substantial number of the industrial users were to be taken over by appellant, the local utilities not only would suffer great losses in revenue, but would be unable to dispense with

more than a trivial percentage of their plant properties. The resultant increase in unit cost of gas would lead necessarily to increased rates for the consumers served by the local companies." (fn. 19, p. 521)

The Court of Appeals in the instant case adopted a restrictive and improper interpretation of the concept of public convenience and necessity. The Court of Appeals commented in its decision that the phrase "public convenience and necessity", as set forth in Section 7 of the Natural Gas Act, was one vague in meaning, subject to any construction. The Court recognized that the phrase has taken on a certain meaning throughout the years because of the administrative interpretation placed upon it.

The Court of Appeals, while characterizing the phrase as a vague one, erroneously stated that its meaning is that which one cares to put into it. Such is not the case. We must presume that all of the language in Section 7, and particularly this phrase, was utilized after due deliberation and consideration by the Congress. It was not idly adopted. Furthermore, that which suits the public convenience and necessity must be read in the context of the entire point and purpose of the Natural Gas Act. The basis of federal regulation in the first instance was that the business of transporting and selling natural gas was "affected with public interest". This Court in *Federal Power Commission v. Hope Natural Gas Company*, 320 U.S. 591, 612, pointed out that, among its other purposes, the Act was designed to prevent exploitation of the consumer. It is not correct then, as the instant decision has done, to read the Act in such a manner as to recognize its protective qualities but, in the next breath, to authorize a scheme which effectively defeats total, meaningful regulation.

California points out to the Court that within the phrase "public convenience and necessity" the federal agency is

authorized, and indeed bound, to take into consideration, in acting upon a certificate application, all factors which have a bearing thereon. This Court should consider the authority given the Commission by Section 7 (f) of the Natural Gas Act, wherein the Commission is authorized to determine a service area of an applicant. Does the law contemplate extended investigation and hearings authorizing a service area and all of the supporting industry and facilities behind it, when in a situation such as here a competing service area must be allowed whether existing facilities are adequate or inadequate? Does not the Commission have some discretion and duty to measure economic impact and public interest occasioned by competing applicants? We submit that the Natural Gas Act gives to the Commission such power.

Reference is made to Section 7 (e) of the Natural Gas Act, wherein the Commission is given authority to grant a certificate only where the proposed service "is or will be required by the present of future public convenience and necessity; otherwise, such application shall be denied." Obviously, that which exists in the present is different from that which will exist in the future. The Congress did not utilize this language without some congressional meaning. We submit that the very situation which is now before the Court must be measured in terms of present economic impact and, further, must be measured in terms of future consequences and as those consequences will affect the future public convenience and necessity.

The alternative which is left in the event the instant decision stands is harmful, ineffective regulation. It is an invitation to producers, who have thus far shown a reluctance toward federal regulation of gas prices, to step over the line to the unregulated area of gas sales. That this will

occur is inevitable, if only because of the unchanging qualities of human nature and the understandable desire of the gas business to exact all that the market can bear.

If the instant decision stands, unregulated pipeline corporations, to survive, will be forced into competition for gas supply at the field level with direct industrial users and bidders. The mechanics of regulation and the administrative delay inherent therein will undoubtedly be the very factors which will cause producers of large gas reserves to deal on a direct basis with pipeline companies, as here. In the latter situation prices can be fixed between the parties, absent all administrative control. The only limitation upon price and return will be the pocketbook of the buyer.

CONCLUSION

In order to preserve a total scheme of regulation, as well as an effective pattern thereof, the decision of the Court of Appeals below should be reversed.

Respectfully submitted,

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February 29, 1960

CERTIFICATE OF SERVICE

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